IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-930

DIXIE LEE RAY, ET AL.,

Appellants,

v.

ATLANTIC RICHFIELD COMPANY, ET AL.,

Appellees.

BRIEF OF THE STATES OF MARYLAND, DELAWARE, MAINE, MINNESOTA, NEW YORK, RHODE ISLAND AND PROVIDENCE PLANTATIONS, FLORIDA, AND IDAHO AS AMICI CURIAE

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INTERESTS OF AMICI CURIAE

The interests of Maryland, Delaware, Maine, Minnesota and New York are presently before this Honorable Court in their Brief In Support of Statements As To Jurisdiction; the interests of the States of Rhode Island, Florida, and Idaho are herein offered.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

The territorial waters of Rhode Island include Narragansett Bay, together with Mount Hope Bay, the Sakonnet River and portions of Block Island and Rhode Island Sounds.

The Rhode Island coastal zone is managed by the Rhode Island Coastal Resources Management Council. Created in 1971, the Council has broad powers to plan, manage and coordinate petroleum processing, transfer and storage of oil on land and on the territorial waters. Sections 46-23-6(b) and 46-23-6(B)(6), General Laws of Rhode Island, 1956, as amended.

Petroleum storage facilities presently exist in Providence, at the head of Narragansett Bay and Newport. Onshore oil support facilities have been proposed for the former naval bases at Quonset Point and Davisville, also on Narragansett Bay. Rhode Island shares the great concern for its historical legitimate role to protect and control the use of its waters.

STATE OF FLORIDA ex rel.
Robert L. Shevin, Attorney General

The State of Florida is endowed with 11,000 miles of saltwater shoreline. Of those, 1,435 miles are sandy beaches; 5,600 miles are mangrove and tidal marshes; and the remaining 4,000 miles are developed shoreline or nonbeach recreational shoreline. Most of the 27 million tourists who annually visit Florida utilize the shore facilities. They spend approximately $9 billion a year. Saltwater commercial fishing in the ocean and gulf produces over $200 million worth of fish at market value per year. Twelve and one half million man days and a total of $500 million per year is spent on sports fishery, including equipment and charter boats, etc. There are 15 deep draft ports in Florida (27 feet or deeper). Over one million tons of freight are brought into these ports per year; one million passengers per year come into the ports.

It is the policy of the State to protect this natural environment. See Article II, Section 7, Florida Constitution; *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). The Florida legislature has enacted Chapter 376, Florida Statutes, to protect Florida's coastal and marine environment from degradation from spillage of oil and other pollutants. Subsection 376.07(f) of Chapter 376 authorized, in part, the Florida Department of Natural Resources to adopt regulations establishing "requirements for minimum weather and sea conditions for permitting a vessel to enter port . . .".

Florida has a great interest in the continued authority to protect its coastal environment through Chapter 376, Florida Statutes, and other means which it may deem necessary and proper.

STATE OF IDAHO

The State of Idaho joins the other Amici States to pursue the principle that a State may legislate to protect the natural resources within its boundaries. Idaho urges also that, in light of the long history of police power regulation, the subject Washington Statute was not impliedly preempted by the Ports and Waterways Safety Act.

OPINION BELOW

The opinion of the Three Judge District Court, United States District Court for Washington dated September 24, 1976, is set forth in the appendix of the Brief of the State of Washington filed with this Court.

JURISDICTION

This appeal is from a final Order entered in a suit for injunctive relief pursuant to 28 U.S.C. §2281, §2284(3). The Order for a permanent injunction was entered on November 12, 1976. Notice of appeal was filed in U.S. District Court for Washington on September 28, 1976.

Jurisdiction of this Court is evoked in accordance with provisions of 28 U.S.C. §1253, authorizing appeal from an Order of a Three Judge Court permanently enjoining enforcement of the state statute when such order gives rise to a substantial question such as one involving conflict between state and federal interests. On February 28, 1977 this Court noted probable jurisdiction based on 28 U.S.C. §1253.

The respective states identified above herewith file as amici curiae pursuant to Rule 42(4) of the Supreme Court Rules of Procedure.

QUESTIONS PRESENTED

1. Whether the states are preempted from enacting legislation to protect their natural resources from damage caused by oil because of the Ports and Waterways Safety Act of 1972, 33 U.S.C. §1221 *et seq.* which is presently in force.

2. Whether the traditional exercise of the police power which has culminated in the passage and enactment of the Washington statute is proper as it relates to interstate and foreign commerce.

STATEMENT

Amici adopt the Statement of Facts presented by the State of Washington.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this controversy are the Supremacy Clause, Article VI, Clause 2; the Commerce Clause, Article I, Section 8, Clause 3; and the Tenth Amendment. The Statutory provisions are 33 USC §1221, §1222, 46 USC 391(a) (the Ports and Waterways Safety Act), and Revised Washington Code §88.16.170 *et seq.* (the Washington Tanker Law).

ARGUMENT I

THE STATES, AS TRUSTEES, HAVE TRADITIONALLY ENACTED LAWS TO PROTECT AND PRESERVE THE COMMUNITY'S INTEREST IN NAVIGABLE WATERS.

The District Court's sweeping conclusion that the Ports and Waterways Safety Act of 1972 (PWSA), 33

U.S.C. §1221 *et seq.*, and 46 U.S.C. §391(a) preempts the provisions of Chapter 125, Laws of the State of Washington, 1975 First Extraordinary Session, codified as R.C.W. §88.16.170 *et seq.* (Chapter 125), curtails the exercise of State police powers designed to protect their territorial waters[1] from the danger of oil pollution from vessels.

Navigational waters have long been afforded a special status incident to citizenship. The use of territorial waters for navigation, commerce and fishing was an unrestrainable privilege held in common by all subjects of the Roman empire. *See* Note, "The Public Trust in Tidal Areas: A Sometime Submerged Territorial Doctrine," 79 Yale L.J. 762 (1970). This same right, the *jus publicum*, was a common right enjoyed by the subjects of the British Crown, as early as the 17th century. While the King of England was considered to hold title to lands under tidal water, his title was encumbered by a trust for the benefit of the public. Even should the King convey private grants or otherwise encumber submerged land, these conveyances remained subject to the *jus publicum*, the trust in favor of the public, for commerce and fishery. *See* Note, *"State and Local Wetlands Regulations: The Problem of Taking Without Just Compensation,"* 58 Va. L. Rev. 876 (1972).

Following the American Revolution, the thirteen original States succeeded to the public trusteeship holding the subaqueous lands within their boundaries for the benefit of the citizens of the Colonies. The interests which had been protected to this date were those basic to the survival of the citizens, but as society

[1] State territorial waters are defined for purposes of this brief as those within the boundaries of the State including those from the shoreline of coastal states to the three-mile limit. 43 U.S.C. §1311 et seq. (Submerged Lands Act of 1953). *See U.S. v. Maine*, 420 U.S. 515; 43 L. Ed. 2d 363; 95 S. Ct. 1155 (1975).

became more sophisticated, the relationship between the public and water usage has also become more complex. *See Just v. Marinette County*, 56 Wisc. 2d 7, 201 N.W.2d 761 (1972).

In *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 97 S. Ct. 582 (1977), this Honorable Court reaffirmed a long line of cases, commencing with *Martin v. Waddell*, 16 Pet. 367; 10 L. Ed. 997 (1842), and extending through *Shively v. Bowlby*, 152 U.S. 1; 14 S. Ct. 548; 38 L. Ed. 331 (1894), which held that it was the State's responsibility to legislate in this area as trustee for the benefit of the public. This is a right carried out by the States completely, so long as the State enactments do not interfere with the navigation easements surrendered to the Federal Government. The method by which the States legislate in this field becomes more intricate as the competing interests for the use of the waters intensify; however, the ramifications of this type of legislation are basically of a local nature. Given the long history associated with the stewardship of navigable waters by the States, and the exercise of the police power so basic to both the proprietary and regulatory interests of the states, the preemption of this authority arises only when an unequivocal intent to occupy this field is displayed in the federal legislation.

While the ownership theory has eroded over the years, it still is a source of a state's regulatory power over the natural resources within its boundaries. In the *State of Maryland v. Amerada Hess Corp.*, 350 F. Supp. 1061, 1066, 1067 (D.C. Md. 1972), an oil spill liability case, the District Court succinctly summarized the state authority flowing from "ownership" of navigable waters:

> The whole ownership theory, in fact is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource. A state may care for its own in utilizing the bounties of nature within her borders because it has *technical ownership* of such bounties or, when ownership is in no one, *because the state may for the common good exercise all the authority that technical ownership ordinarily confers.* (Emphasis supplied) *Toomer v. Witsell*, 334 U.S. 385, 402, 408 (1948), *rehearing denied*, 335 U.S. 837 (1948).

This Court and the lower Courts have recognized the serious consequences of oil pollution which State laws such as Chapter 125 seek to avoid.

> Oil pollution of the nation's navigable waters by seagoing vessels both foreign and domestic is a serious, and growing problem. The cost to the public, both directly in terms of damage to the water and indirectly of abatement is considerable. *California, Department of Fish and Game v. S.S. Bournemough*, 307 F. Supp. 922, 929 (C.D. Cal. 1969).

The State's role in legislating in this area has been recognized in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). In that case, this Honorable Court determined that the State of Florida could enact a statute imposing strict liability upon foreign vessels for damages sustained by the State of Florida or its citizens as a result of oil pollution. It was determined that Florida's law could be construed harmoniously with the Federal Water Quality Improvement Act, 33 U.S.C. 1161 *et seq.* Perils of oil pollution were specifically addressed. It was noted that public beaches could be ruined by oil spills, that shellfish beds could be destroyed and the livelihood of fishermen endangered. *Askew, supra* at 332-33.[2]

[2] For a recent study of the increased toxic effects of spilled number 2 fuel oil after exposure to sunlight see article by Dr. Richard A. Larson, Laura L. Hunt and David W. Blankenship, to be published in *Environmental Science and Technology*, 1977. After being exposed to sunlight, hydrocarbon

This case law, as well as recent Congressional legislation discussed below, evidences a scheme of federal-state cooperation which preserves the state's role. Indeed, the constitutional grants of federal authority over interstate commerce, naval facilities, (Art. I, §8) and judicial jurisdiction over admiralty and maritime cases, (Art. III, §2) contain no hint that the States intended to surrender their public trust duties over territorial waters to the federal government.

ARGUMENT II.

THE PORTS AND WATERWAYS SAFETY ACT OF 1972 DOES NOT PREEMPT THE STATES FROM EXERCISING THEIR POLICE POWERS TO PREVENT OIL POLLUTION OF THE TERRITORIAL WATERS.

Legislation enacted to protect states' natural resources are not deemed preempted by federal enactment, unless the "nature of the [federally] regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Florida Lime & Avacado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1962), citing *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1950); *DeCanas v. Bica*, 424 U.S. 351, 356 (1976).

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compounds in number 2 fuel oil are transformed into toxic peroxides, phenols and acids, all compounds that dissolve easily in water and are toxic to marine life.

Effects of oil spills in estuaries are characterized by Donald F. Boesch, Carl H. Hershrer and Jerome H. Milgram, *Oil Spills and the Marine Environment* (Cambridge, Mass., 1974) at page 25.

> "Several characteristics of estuaries suggest that oil pollution may have serious effects there. Because estuaries are generally confined and relatively shallow bodies of water, oil spills may not spread over a large area of the water's surface and have little chance to be swept out to sea. Instead, there is a high likelihood that the oil will reach shore or the bottom. Estuaries are typically turbid, and therefore floating oil may tend to absorb onto fine sediment particles and sink to the bottom, where it may kill or contaminate bottom-dwelling organisms, including shellfish and bottom feeding fishes."

A. There Is No Clear and Manifest Congressional Expression of Preemption In The PWSA.

Title I of the PWSA, 33 U.S.C. §1221(b) and (c), provides that States are not preempted from prescribing "*higher* safety equipment requirements or safety standards" relative to "structures". The District Court impliedly agreed that the Federal Act did not expressly preempt State laws adopting safety standards regulating operation of oil tankers when the sole purpose is to safeguard their waters, their shellfish and floating fish and their recreational marine environments from oil pollution.

The District Court determination that the PWSA preempts Chapter 123 because it establishes a "comprehensive federal scheme" is contrary to the principles of implied preemption set down by this Court upholding local regulations related to health, safety and pollution control. *See Huron Portland Cement Co. v. Detroit*, *supra*.

Whether a comprehensive scheme is presented in the federal legislation is but one factor to be considered in order to show the Congressional intent to preempt. Did, in fact, Congress so forcibly occupy the present field of regulation that they intended to shove aside the states' traditional efforts with respect to protection of their natural resources? Was the need for uniformity so great that Congress had no alternative but to intentionally preempt this area?

In *Bethlehem Steel v. N.Y. State Labor Relations Board*, 330 U.S. 767, 780 (1947), Mr. Justice Frankfurter stated:

> . . . Since Congress can, if it chooses, entirely displace the states to the full extent of the far-reaching commerce clause, Congress needs no help from generous judicial implications to achieve the

> supersession of state authority. To construe federal legislation so as not needlessly to forbid pre-existing state authority is to respect our federal system. *Any indulgence in construction should be in favor of the states,* because Congress can speak for itself with drastic clarity whenever it chooses to assume full federal authority completely displacing the states. (emphasis added)

In *Reid v. Colorado,* 187 U.S. 137, 148 (1902), Justice Harlan stated:

> It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This Court has said — and the principle has been often reaffirmed — that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Sinnott v. Davenport,* 22 How. 227, 243; 16 L. Ed. 243, 247 (1859).

When dealing with the "the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties", this Court's analysis is "tempered by the conviction that the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." *Merrill Lynch, Pierce, Fenner and Smith, Inc v. Ware,* 414 U.S. 117, 127 (1973) citing *Silver v. N.Y. Stock Exchange,* 373 U.S. 341, 357 (1963); *Decanas v. Bica, supra,* at 357.

The reconciliation of federal and state laws affecting maritime activities has ample precedent. In *Kelly v. Washington,* 302 U.S. 1 (1937) this Court sustained the coexistence of local inspection laws for motor driven tugs engaged in interstate and foreign commerce, and federal certification statutes which included inspection

provisions. The overriding state interests sought to be protected in *Kelly v. Washington, supra,* are strikingly similar to those in the instant case.

> "When the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the State to exclude diseased persons, animals and plants. These are not proper subjects of commerce, and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce. When the state is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the state of the power which it would otherwise possess." *Id.* at 14.

In the 1960 case of *Huron Portland Cement Co. v. Detroit, supra,* a municipal air pollution law applied to vessels engaged in interstate commerce was sustained as compatible with federal safety inspection laws, even though the vessels required structural changes to comply with the Detroit ordinance. As recently as 1973, in *Askew v. American Waterways Operators, Inc., supra,* a Florida oil spill liability law was reconciled with the comprehensive federal oil spill liability provisions of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §1251 *et seq.*).[3]

In the instant case, the provisions of Chapter 125 are intended to impose the minimum standards considered necessary to prevent oil spills in Puget Sound, §88.16.170 of Chapter 125.[4] The provisions of Chapter

[3] *Askew v. American Waterways Operators, Inc., supra,* was decided less than one month prior to *City of Burbank v. Lockheed Air Terminal,* 411 U.S. 624 (1973). This Court distinguished State regulation of airlines from state regulation of vessels even when environmental protection is the manifested purpose.

[4] Compliance with Chapter 125 requirements has the carryover effect for other port areas of assuring that tankers will not become unsafe, unseaworthy or a source of pollution.

125 should be considered as the local safety standards for oil tankers entering Puget Sound, contemplated as part of the national scheme by the authors of the PWSA. 33 U.S.C. §1221(c), (e) (3). Each port in the United States must and ultimately will implement its own safety standards. This will occur whether it be by state or federal fiat.

B. The Subject Matter Being Regulated, Due to the Vagaries of Each Locality, Does Not Demand Uniformity Vital to National Interests.

The issue of uniformity was raised in *Cooley v. Board of Wardens of Port of Phila.*, 53 U.S. 299 (1851), in which a local law required all vessels arriving from or bound to any foreign port, and every vessel over 75 tons sailing to any port in the Delaware River, to receive a local pilot. The question of preemption turned, in part, upon the alleged need for uniformity of pilot regulations. This Court stated:

> ". . . the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants." *Cooley v. Board of Wardens of Port of Philadelphia, supra* at 320.

See also Florida Lime & Avacado Growers, Inc., supra, at 143-44. The safeguards provided by Chapter 125 *i.e.*, tug escorts, prohibition of supertankers, are consistent with the theme of local regulation expressed in *Cooley v. Board of Wardens of Port of Philadelphia, supra*. National uniformity is neither contemplated nor realistic. Where the physical risks of groundings are high and/or the productivity of the waters is of significant environmental and economic importance, it is the State which should determine if and under what

conditions an oil tanker may enter confined state waters. The decision has a direct impact on the heart of the state's economic interests. To deprive the states of this authority, given the equivocal language of the federal statute, is to strip the states of a significant attribute of their sovereignty.

For example, the State of Maine in 1970 adopted its Site Location and Development Act, 38 M.R.S. §481 *et seq.*, empowering the Board of Environmental Protection to approve location of, *inter alia*, major industrial developments in the State. Pursuant to this law, the Board disapproved a proposed oil refinery at Searsport, Maine, (decision was sustained by the Supreme Judicial Court of Maine, *In Re Maine Clean Fuels, Inc.*, 310 A.2d 736 (Me. 1973)) and approved, subject to numerous conditions, an oil refinery at Eastport, Maine.

The Board rendered specific findings and imposed conditions relative to the movement of vessels carrying crude oil, the particular route, the type of vessels, and the assistance necessary through pilotage, aids to navigation, and necessary equipment. The conditions imposed by the Board, which also included provision for double bottoms and segregated ballast, clearly demonstrate the particularized interest Maine has in protecting its waters and shores from oil pollution. At the same time, they reflect a State determination of the balancing necessary to protect these resources and accommodate economic growth.

C. There Is No Direct Conflict Between The Ports And Waterways Safety Act and Chapter 125 Of the Laws of Washington.

In the instant case, the District Court did not find irreconcilable conflicts between the provisions of the Ports and Waterways Safety Act (PWSA), 33 U.S.C. §1221 *et seq.*; 46 U.S.C. §391(a), and Chapter 125. This

case does not present a conflict between Federal and State enactments, even under the District Court's determinations, for that decision was a pure preemption decision. The Court inferred an intent to preempt from the "comprehensive federal scheme". *See Kelly v. Washington, supra.*

Oil tankers can comply with the provisions of both the PWSA and Chapter 125. A factual analysis of the two acts demonstrates that, if tankers are without the preferred design and equipment (§88.16.190 of Chapter 125), then tug escorts provide the reasonable alternative. There are no comparable tug escort provisions within the PWSA or in current federal regulation.[5] Likewise, oil tankers over 125,000 dead weight tons (DWT) which by §88.16.190 of Chapter 125 are prohibited from entering Puget Sound, may continue off-loading their cargoes into smaller tankers or use the proposed Port Angeles or other deep water ports contemplated by the Deepwater Port Act of 1974, 33 U.S.C. §1501 *et seq.* The PWSA does not preclude such alternatives. The PWSA, §1221(5) expressly authorizes State pilots on self-propelled vessels engaged in the foreign trades. Thus it is possible to comply concurrently with both federal and state enactments. The adoption of a comprehensive scheme is not determinative, by itself, of a federal intent to preempt. Assuming, *arguendo,* that the District Court is accurate in its findings that "a comprehensive federal scheme" is envisioned by the PWSA, it does not follow that all state laws on the subject matter are automatically

[5] The Coast Guard on May 6, 1976 published advanced notice of proposed minimum standards for tug escort in confined waters. While actual regulations have never been offered, the advance notice recognizes that tug assistance in confined waters is intended to reduce the potential for collisions, rammings, and groundings in these areas. Inherently, the tug requirement will differ for each waterway. 41 Fed. Reg. 18770 (May 6, 1976).

preempted. Where "Congress has outlined its policy in general and inclusive terms and delegated determination of their specific application to an administrative tribunal," State legislation occupying the same field encompassed by the federal law may also be upheld in the *interim,* pending the adoption by federal authorities of the comprehensive protective rules and regulations required to carry out the federal scheme. *Bethlehem Steel Co. v. New York Labor Relations Board, supra,* at 773, 774; *Colorado Anti-Discrimination Commission v. Continental Air Lines,* 372 U.S. 714, 723-724 (1963); *Northwestern Bell Telephone Co. v. Nebraska State Commission,* 297 U.S. 471 (1936); *Welch Co. v. New Hampshire,* 306 U.S. 79 (1939). This test is applicable to the case at bar.

The tug-escort provision of Chapter 125, §88.16.190, is a basic alternative to greater tanker safety design and equipment features required elsewhere within that provision. The District Court, referencing 33 U.S.C.A. §1221(3)(iv), concluded that the PWSA preempts the tug-escort provisions of Chapter 125, even though it does not directly refer to tug-escort. While it may be argued that tug-escort is authorized under that Section, the Coast Guard is only in the preliminary stage of promulgating minimum standards for tug assistance in confined waters. 41 Fed. Reg. 18770 (May 6, 1976). Until the Coast Guard standards are promulgated, Washington's tug-escort provisions should fill the gap in order to reduce the chances of oil spills in Puget Sound.

The adoption of federal regulations does not in and of itself void "interim" state regulation for it is abundantly clear from the record that federal regulations to date are not effective in preventing oil pollution from tankers. In *Bethlehem Steel, supra,* this Court held that it is only "when the comprehensive [federal] regulations *effectively* governing the subject matter of the statute

. . ." have been adopted that state regulation is invalid. *Napier v. Atlantic Coastline R. Co.*, 272 U.S. 581 (1928) (Emphasis added)

In 1975, the M/T EDGAR QUEENY collided with the M/T CORINTHOS off Marcus Hook, Pennsylvania, resulting in discharges of approximately 13 million gallons of crude oil. In 1976, there was a rash of serious oil tanker spills. On October 29, 1976, the tanker RICHARD C. SAUER discharged 75,000 gallons of its cargo of 9,240,000 gallons of light crude oil. On December 15, 1976, the now famous ARGO MERCHANT ran aground and broke apart off Nantucket, Massachusetts, spilling 7.5 million gallons of number 6 oil. On December 27, 1976, the tanker OLYMPIC GAMES ran aground spilling 134,000 gallons of crude oil into the Delaware River near Marcus Hook, Pennsylvania. The oil tanker tragedies have continued on into 1977. On January 4, 1977 the tanker GRAND ZENITH broke up, discharging approximately 8 million gallons of number 6 oil south of Nova Scotia. Significantly, in 1977 there have been several "close calls". On January 5, 1977, the tanker UNIVERSE LEADER grounded in the Delaware River, Pennsylvania. No leakage occurred, but the potential discharge was 21,000,000 gallons of crude oil. On January 11, 1977 the vessel AMOCO INDIANA ran aground in Grand Traverse Bay, Great Lakes. No leakage occurred, but the vessel had a cargo of 2,310,000 gallons of number 2 diesel fuel. On January 13, 1977, the tanker HARMONIC grounded in Gravesend Bay, New York, and, while losing only a negligible amount of oil, had a cargo of 27 million gallons of light crude oil. On January 25, 1977, the tanker OVERSEAS ALICE grounded near Baltimore, Maryland. Again no spill occurred but the potential was 5,880,000 gallons of gasoline. *See* "Oil Spills, And Spills of Hazardous Substances", Oil and Special Materials Control Division Office of Water Programs Operations, U.S. Environmental Protection Agency, March, 1977.[6] Until *effective* federal regulation has been adopted incorporating the provisions of Chapter 125, the state law must stand as a means of protecting valuable natural resources.

Section 88.16.180 of Chapter 125 requires any oil tanker whether enrolled or registered, of 50 thousand DWT or greater to take a Washington State licensed pilot while navigating in Puget Sound and adjacent waters. The District Court, citing 46 U.S.C. §215 and §374, found that states may require state licensed pilots for "registered" vessels (those entitled to engage in international trade, 46 U.S.C. §11), but may not require such pilots for enrolled vessels engaged in coastwise trade. It does not necessarily follow, however, that all of the provisions of Chapter 125 relating to state licensed pilots are preempted.

The State of Delaware still recognizes the need for local knowledge and experience of pilots for vessels traveling to or from ports in the Delaware River or Bay. Title 23, Section 117 of the Delaware Code requires a State pilot for such vessels. A Delaware license for piloting vessels drawing over 27 feet of water is not granted to any person unless he/she has served an apprenticeship of at least four years to a licensed pilot and, under the inspection of his/her master or pilot,

[6] Also listed in the EPA publication are actual and potential oil discharges from barges. On January 9, 1977, 80,000 gallons of number 2 diesel oil was spilled in Tampa Bay, Florida. In January 1977, a barge grounded in the Chesapeake Bay which could have discharged 608,000 gallons of number 6 oil. Again, a potential discharge of 840,000 gallons occurred on the Potomac River on January 17, 1977. On January 24, 1977 the Chesapeake Bay nearly suffered a 276,000 gallon and 138,000 gallon discharge of number 2 oil and kerosene respectively. On January 28, 1977, 100,000 gallons of heating oil were discharged into Buzzards Bay near Massachusetts.

conducted a vessel for at least 96 trips up or down the Delaware River and Bay. 23 Del. Code, Section 112, 113, 114.

In the instant case, the District Court concluded that the PWSA establishes a comprehensive federal scheme for regulating, *inter alia*, pilotage of tankers. (See Appendix to the Brief of the State of Washington.) In fact, the PWSA expressly acknowledges and reserves to the State regulatory authority over pilots. 33 U.S.C. §1221 (5) provides:

> . . . The Secretary of the department in which the Coast Guard is operating may
>
> * * * * * *
>
> (5) require pilots on self-propelled vessels engaged in the foreign trades in areas and under circumstances *where a pilot is not otherwise required by State law to be on board until the State having jurisdiction of an area involved establishes a requirement for a pilot in that area or under the circumstances involved.* (Emphasis supplied)

The Revised Code of Washington, §88.16.190, requires all applicants for a State pilots license to obtain, as a prerequisite, a first-class federal license to pilot on Puget Sound and adjacent inland waters. Thus, in most instances, the federal and state pilots will be one and the same, leaving the conflict between the statutes, as applied, more illusory than real. Even if the State requirement relative to "coastwise vessels" is considered preempted, the remaining segment of that provision must be determined as enforceable and valid for Congress in the PWSA has specifically authorized state pilots for "registered vessels." 33 U.S.C. §1221(5).

D. The Recent Scheme of Federal Legislation Recognizes the States' Exercise of Police Power to Conserve and Protect Their Natural Resources.

The Federal Water Pollution Control Act Amendments of 1972, codified as 33 U.S.C.A. §1251 *et seq.*, the subject of the dispute in *Askew v. American Waterways Operators, Inc., supra,* invites the states to impose "any requirement *or* liability with respect to the prevention of a discharge of oil or hazardous substance into any waters within such state." 33 U.S.C. §1321(O)(2). Chapter 125 provides those "requirements" by authorizing a group of alternatives, i.e., the design standards, the tug escort provisions and the prohibition of supertankers, all considered necessary to prevent the discharge of oil pollutants into Puget Sound.

The Coastal Zone Management Act of 1972, 16 U.S.C.A. §1451 *et seq.*, recognizes the various stresses and impacts on coastal estuarine areas, stating *inter alia:*

> (c) The increasing and competing demands upon the lands *and waters* of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, . . . extraction of mineral resources and fossil fuels, *transportation and navigation*, . . . harvesting of fish, shellfish, and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion. (Emphasis added)

And in subsection (h), Congress declares:

> *The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the States to exercise their full authority over the lands and waters of the coastal zone by assisting the states.* . . . (emphasis added)

In §1452, Congress underlines the states lead role, calling for support for the states' programs which should be designed to sustain the traditional uses of the zone.

> (b) to encourage and assist the States to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historical and aesthetic values as well as needs for economic development.

Section 1453 defines "coastal zone" to include "coastal waters" including those waters adjacent to shorelines, containing a measurable quantity or percentage of sea water, including but not limited to, sounds, bays, lagoons, bayous, ponds, and estuaries. Both Puget Sound and the Chesapeake Bay are prime examples of coastal waters which must be protected from adverse effects associated with transportation, navigation and the shipment of oil thereon. Under the present scheme of state and county laws, local communities could utilize their zoning powers to redefine and proscribe uses for the various areas of the zone within the state. Such actions, for instance, could prohibit port uses in certain localities. The retention and exercise of this local zoning authority evidences the diverse influences on coastal zone areas, belying the claimed need for federal uniformity.

As anticipated by the federal statute, Maryland, in 1975, enacted a Coastal Facilities Review Act, codified as §6-501 *et seq.*, Natural Resources Article, Annotated Code of Maryland (1974 Vol., as amended), to formally implement a State coastal zone management plan pursuant to the Federal Coastal Zone Management Act of 1972. The State Act recognizes that the coastal area bordering on the Atlantic Ocean and the Chesapeake Bay is productive yet ecologically fragile. The fish, shellfish, and other living marine resources and wildlife

are declared to be a unique, irreplaceable, natural and esthetic resource of great economic value. The Act recognizes that oil transported into or through Maryland by tanker or pipeline will generate new competing demands upon the waters of the State, and that it is in the interests of both the State and nation to require a method of resolving these demands, "which will give a high priority to the natural systems of the coastal zone and promote the public health, safety and welfare." Natural Resources Article §6-502(b) Annotated Code of Maryland (1974 Vol., as amended). The Act is replete with references to the need to strike a reasonable balance between national energy needs and coastal resources protection. State permits are required prior to the construction of port or harbor facilities for the handling of oil tanker cargoes. Inherent in the coastal facilities review process is the designation within the State of certain waters for conveyance of oil laden tankers and the exclusion of such tankers in other unsuitable waters. Natural Resources Article §6-508 Annotated Code of Maryland (1974 Vol. as amended). State regulations are being adopted setting forth extensive criteria for the evaluation of the impact of any proposed oil facility in the coastal zone. The District Court's decision in the instant case questions, contrary to express Congressional intent, the legitimate role of any State in planning for the coastal zone.

The Deepwater Port Act of 1974, 33 U.S.C. §1501 *et seq.*, conditions issuance of a license for a deep water port upon the approval of the issuance by the Governor of the adjacent coastal state, §1503(c)(9), and the reasonable progress by that adjacent coastal state of an approved coastal zone management program pursuant to the Coastal Zone Management Act of 1972, §1503(c)(10). Congress has thereby expressly provided for continued state authority, in the form of an absolute veto, to control the uses of its waters including the

construction of deep water ports into which the oil tankers in excess of 125,000 DWT are to off-load their cargoes.

As anticipated by the federal enactment, the Maryland Legislature has this term enacted State legislation authorizing State participation pursuant to the Federal Statute.

When the provisions pertaining to protection of the marine environment of the Ports and Waterways Safety Act of 1972 are reviewed with the background of the above-referenced federal acts, a federal scheme providing for state power to regulate activities within its waters emerges. It is within this framework that Chapter 125 and all other similar State legislation must be reviewed.

ARGUMENT III.

CHAPTER 125 IS A PROPER EXERCISE OF WASHINGTON STATE'S POLICE POWER.

The protection of exhaustible natural resources is a valid exercise of a state's police powers. *See Corsa v. Tawes,* 149 F. Supp. 771 (D. Md. 1957); *Marks v. Whitney,* 6 Ca. 3d 251, 491 P.2d 374 (1971), *see also Maryland Dept. of Nat. Res. v. Amerada Hess Corp.,* 350 F. Supp. 1066 (D. Md. 1972). The extent to which these powers may be utilized vary according to the scope of regulation and the subject matter which is to be protected. In *Berman v. Parker,* 348 U.S. 26, 32 (1954), this court characterized the police powers in the following manner:

> We deal in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. * * * Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. * * * The role of the judiciary in determining whether that power is being exercised for a public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. *Id.* at 32.

See also Lawton v. Steele, 152 U.S. 133, 136, 137 (1894).

A "material" interference with maritime commerce by an exercise of the police powers is acceptable when protecting areas of local concern, including rivers, harbors, piers, docks, quarantine regulations, and game laws. *South Carolina Highway Dept. v. Barnwell Bros.,* 303 U.S. 177, 187 (1938); *Huron Portland Cement Co. v. Detroit, supra.* Local safety measures for these areas are *presumed* to be valid. *Bibb v. Navajo Freight Lines, Inc., supra,* at 524.

Chapter 125 is designed to prevent sea-to-shore oil pollution in Puget Sound. This Court since 1851 has continuously sanctioned a progression of state actions seeking to protect local natural resources, even though they affected maritime activities and interstate and foreign commerce. *Bob-lo Excursion Co. Michigan,* 333 U.S. 28, 37, 38 (1948). Significant examples include *Cooley v. Bd. of Port Wardens of the Port of Phila., supra,* in 1851, (state pilots for vessels in state waters); *Kelly v. Washington, supra,* in 1937 (local inspection of motor-driven tugs engaged in *interstate* commerce); *Huron Portland Cement Co. v. Detroit, supra,* in 1960 (application of municipal air pollution standards to vessels engaged in interstate and foreign commerce); and *Askew v. American Waterways Operators, Inc., supra,* in 1973 (sanctioning state regulations of "any requirement or liability" to prevent and mitigate the

damages resulting from "insidious" oil pollution). State regulations requiring local pilots for local waters, employment of safety design and equipment for oil tankers, or alternatively, utilization of tug escorts, and the prohibition of oil tankers over 125,000 DWT from entering Puget Sound (or any other body of water within a State), are necessary to accomplish the desired result, *i.e.,* reduce the hazard of an oil spill in Puget Sound.

This Court should honor the presumption that the State legislature has passed a constitutional statute in regulating certain activities. The Honorable Chief Justice observed in a recent obscenity case, *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1974):

> ". . . It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional cases where that legislation plainly impinges upon rights protected by the Constitution." 413 U.S. at 60.

Illustrating this principle, the Chief Justice stated:

> ". . . when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams, and parks, they must act on such imponderables as the impact of a new highway near or through an existing park or wilderness area." See *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 417-420, 91 S. Ct. 814, 824-826 (1971). *Id.* at 62.

It is not necessary that the subject legislation be the best or only method to accomplish the given end. It is necessary only that the legislation manifests a tendency to at least cure the contemplated evil. *North Dakota Bd. of Pharmacy v. Snyder's Drug Stores,* 414 U.S. 156 (1973). Today while proposed changes to our natural environment are received with increased scrutiny, while the pressures of a more mobile, energy intensive society intensity the attack on the environ-

ment, the risks associated with energy transportation increase. The states have attempted to take the initiative in preserving and safeguarding our natural heritage for future generations. This is only proper since the effects of maritime pollution directly impact their citizens. This is what the police power has traditionally accomplished. If indeed this action approaches a "burden" on the maritime, interstate and foreign commerce scheme, then under the concept of an expanding police power to protect our invaluable natural resources, this "burden" is justifiable. *Great Atlantic & Pacific Tea Co. Inc. v. Cottrell,* 424 U.S. 366, 375 (1976).

The "burdens" alleged to be imposed as a result of Chapter 125 are minimal. For the most part, they translate to an allegation of increased costs, which do not sustain a constitutional challenge to Chapter 125. *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 424 (1952); *Breard v. Alexandria,* 341 U.S. 622, 638 (1951).

For instance, with regard to the design requirements of Chapter 125, the cost of double bottoms as testified to during congressional hearings on the Ports and Waterways Safety Act of 1972 is a:

> . . . miniscule factor in terms of petroleum cost because of the tiny proportion of total petroleum cost that is represented by tanker transport. The economic feasibility of double bottom construction is further highlighted by the fact that one company, Mobil Oil Corporation, has contracted for double bottom construction of its tankers on solely economic grounds. Further, double bottoms are already used on many Great Lakes ships, on vessels on the inland waterways, and on general cargo ships. 2 U.S.C., Congressional and Administrative News 1972 at 2778.

The design and safety requirements of Chapter 125 are not beyond what is plainly essential to safety and

seaworthiness.[7] The maximum ahead horsepower currently applied for general use in the United States (set forth in paragraph 112 of the Pretrial Order) is the equivalent of .21 hp per DWT for a 120,000 DWT vessel, and .17 hp per DWT for a 145,000 DWT vessel. These figures were summed up in the Legislative History, to wit:

> In terms of maneuverability the 30,000 horsepower propulsion unit currently being installed in supertankers of 250,000 tons is the equivalent to a one-third horsepower motor on a 40-foot boat. 2 U.S.C. Congressional and Administrative News 1972, at 2778.

Once a tanker gets underway, momentum builds, and reversing that process to stop the vessel is a formidible task. A 125,000 DWT vessel utilizes approximately 3,000 feet to stop at 6 knots and 13,000 feet at 16 knots. (Paragraph 112 of the Pretrial Order). This inability to control large oil tankers in Puget Sound or in the Chesapeake Bay could result in groundings and collisions, both capable of producing the destruction wrought by episodic oil discharges.

The same type of cost analysis applies to the provisions of Chapter 125, §88.19.190(1). What are the actual increased costs? According to ARCO and Seatrain, this prohibition will require employment of more people and the operation of additional, smaller oil tankers. This argument assumes, however, that a deepwater port, as contemplated by the Deepwater Ports Act of 1974, will not be utilized. Secondly, this allegation assumes also that large tankers will transport Alaskan oil to Puget Sound, thereby affecting a cost savings on each barrel.

[7] The National Governor's Conference, Winter Session, March 1, 1977, has resolved that double bottoms, multiple radar, segregated ballast are necessary for adequate protection of their waters from oil tanker pollution. See also pending federal legislation, S.182, S.568, 95th Congress, 1st Session, *amending* the PWSA where the Coast Guard is instructed to require double bottoms, multiple radar.

In order for the larger tankers to be competitive, they are being federally subsidized pursuant to the construction-differential and the operational-differential subsidies of the Merchant Marine Act of 1970, 46 U.S.C.A. §1151. This applies to new and refitted vessels. Subsidized vessels are exclusively restricted to use in foreign trade and may not operate in coastwide domestic trade unless a certain percentage of the subsidy is repaid. 46 U.S.C.A. §1156; 46 U.S.C.A. §1175. The repayment of the subsidies would substantially decrease the cost benefits of the use of tankers over 125,000 DWT.

All of ARCO's vessels which it currently operates and intends to use in the Alaska-West Coast trade are less than 125,000 DWT (Paragraphs 24, 139 of Pretrial Order). Two vessels of 150,000 DWT which ARCO claims an intention to use in coastwise trade are not yet in service. (Paragraph 24 of Pretrial Order). It is not clear from the Pretrial Order whether these two vessels are being subsidized, but if so, they too may not be used in coastwise trade unless the subsidies are partially repaid. Three other vessels under contract, two of which are 150,000 DWT and the third which is 120,000 DWT, are *not* eligible for coastwise trade. (Paragraph 34 of Pretrial Order)

Of the twelve vessels currently operated by Seatrain, four are over 125,000 DWT, and all four are chartered, foreign flag vessels which are prohibited from the Alaska-West Coast trade. (Paragraph 32 Pretrial Order) The four vessels over 125,000 DWT being built at the Brooklyn Navy Yard are subsidized and ineligible for coastwise trade. (Paragraph 137 Pretrial Order) This includes the T.T. STUYVESANT and the T.T. BAY RIDGE (Paragraph 38 Pretrial Order).

In addition, as of December 1975, there was over 100 million DWT of surplus capacity in the world oil tanker fleet. (Paragraph 52 of Pretrial Order). The costs of maintaining a "moth-balled" oil tanker fleet of 100 million DWT (presumably composed largely of older vessels under 125,000 DWT) further weakens ARCO's and Seatrain's argument that the Washington prohibition increases operational costs and thereby places an undue burden on interstate and foreign commerce.

The prohibition provision of Chapter 125 §88.16.190(1) excludes supertankers only from Puget Sound and adjacent waters whose unique ecological system was thought worthy of special treatment by the legislature. These vessels may ply all other water areas within the state. To hold that states cannot for good reason prioritize their natural resources by conferring special treatment, is to deprive the states of their powers to safeguard that resource from destruction.

Prohibitions against unrestricted movement in interstate commerce of "dangerous article or cargoes" which threaten life and property, are not unique to the legislation in question. States may prohibit or restrict movement of "dangerous articles or cargoes" over or through certain avenues used for interstate commerce such as underwater tunnels, because of the overwhelming risks created by the transport, *People v. Transamerican Freight Lines, Inc.*, 320 N.Y.S.2d 257, 259 (1969). Legislation has been enacted in various states restricting and prohibiting the transport of "dangerous articles or cargoes" such as explosives, flammable liquids and solids, combustible liquids, oxidizing materials, corrosive liquids, compressed gasses, and poisonous articles, through specific tunnels and over specific bridges. Article 89B, §120C, Annotated Code of Maryland (1969 Repl. Vol.)[8] Vehicles with such cargoes must travel by

[8] Maryland law prohibits the transport of Class A explosives through the Baltimore Harbor Tunnel, Susquehanna River Toll Bridge, Potomac River Toll Bridge and Chesapeake Bay Toll Bridge except as provided by rules of the State Roads Commission. Vehicle escort analogous to tug escort in the instant case, is a common regulatory requirement. *See also,* Title 14, Ch. 85 §2B, Annotated Laws of Massachusetts; Title 75 §240 *et seq.* Pennsylvania Statutes Annotated; Article 38 §1630(2), 1642(21); New York Consolidated Laws Service, Annotated Laws of New York (1976 Vol); Title 31, Ch. 23, §37 of General Laws of Rhode Island (1956, As Amended).

alternate routes. Transportation of other dangerous articles through such tunnels and all explosives passing over certain bridges must be accompanied by vehicle escort. These requirements are analogous to the provisions of Chapter 125. Supertankers entering Puget Sound may off-load into smaller tankers or utilize deepwater ports in Washington waters. Smaller tankers may enter Puget Sound accompanied by tug escorts.

ARCO's and Seatrain's challenge to the tug escort provision of Chapter 125 §88.16.190(2) also boils down to that of increased costs. Yet tug escort is "cheap insurance" for tanker owners. The cost of one large spill which may be averted by a tug escort (or proper design or safety features, for that matter) substantially exceeds the money which may be saved. The cost of cleanup of a 135,000 gallon oil spill in Baltimore Harbor during August of 1975 was in excess of $420,000. Costs of cleanup are over and above costs due to the loss of resources.

Thus the requirements imposed by Chapter 125 do not in the aggregate amount to an unconstitutional "burden". The subject Washington statute is mandated by the unique physical characteristics and environmental needs of the local waters. It is not discriminatory, frivolous or excessive, but serves to protect, hopefully, Puget Sound (and other water bodies) from the perils of oil spills.

CONCLUSION

The Washington State Legislature has enacted Chapter 125, the sole purpose of which is to guard against and reduce the risks of oil spills. The Legislature made a value judgment based upon the facts at hand; increased tanker traffic, increased handling and, accordingly, an increased threat of oil spills. They determined that the need to provide added protection for Puget Sound outweighed an anticipated loss of revenue the Port would suffer through reduction of tanker traffic. Each alternative carries with it major economic and environmental implications, but the choice was made at the point of impact, at the state level. That choice was an outgrowth of Washington's traditional obligations as trustees of the state's waters for the benefit of their citizens.

Against this background of state action, the District Court determined that the Port and Waterways Safety Act of 1972 implicitly preempted Washington's initiative, even though this federal act has not been fully implemented. When weighing the equivocal language of the federal legislation against the primary role of the

state, both under its police power and the responsibilities conveyed to the states by recent federal legislation, the intent to preempt should not be a matter of inference or implication.

Respectfully submitted,

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